RECORD
AND
BRIEFS

SUPREME COURT, U.S.
FILED
JUN 4 - 2011
OFFICE OF THE CLERK

No. 10-1313

In The
Supreme Court of the United States

JOHN R. CLELLAN,
Petitioner,

v.

STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari

PETITIONER'S REPLY BRIEF

JOAN KATHLEEN CLELLAN
Counsel of Record
P. O. Box 492
Galloway, Ohio 43119
(614) 561-8657
E-MAIL: jm.dandy60@yahoo.com

Counsel for Petitioner

June 3, 2011

Library of Congress
Law Library

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES CITED v

QUESTIONS PRESENTED.....i - iii

CONSTITUTIONAL & STATUTORY PROVISIONS.....vi

PETITIONER'S REPLY BRIEF 1

First Question Presented:

I. Where an appellate court reviews an application for Reopening an Appeal based upon a claim of ineffective assistance of appellate counsel, that court may not find failure to preserve and produce applicant's requested dash camera video-taped "confession' after arrest and position of attacker's car in road, potentially useful evidence and not materially exculpatory when such decision conflicts with established appellate caselaw.....1

Second Question Presented:

II. Where an appellate court denies an application for Reopening an Appeal, as above-stated, that court may not find failure to produce in discovery a deputy's statement presented second day of trial and entered into evidence by trial judge without defense counsel's objection, not prejudicial to Petitioner or to the outcome of his case, without examination of that officer's statement and reliance on the transcribed description of such evidence alone.....4

Third Question Presented:

III. Where a "test case" for the "Castle Doctrine" is presented to a jury along with an improper proposed jury instruction regarding Ohio Revised Code Section 2901.05 that was further improperly modified by the trial court, the reviewing court may not find that such jury instructions did not deprive Petitioner of a fair trial and due process rights.....7

Fourth Question Presented:

IV. Where an attacker had admitted to a 911 dispatcher that he went up to Petitioner who was lawfully in his own vehicle and began threatening Petitioner, the appellate court may not, both on Appeal and on Application for Reopening, rely on its own interpretation of what

"in the process" entails under Ohio Revised Code Section 2901.05, adding burdens upon the Petitioner not set forth in the statute.....9

Fifth Question Presented:

V. The Ohio Supreme Court ought not to have declined jurisdiction to hear a test case under the "Castle Doctrine" which, as interpreted by both trial and appellate courts, denies Petitioner the inalienable constitutional right of self defense as set forth in recent decisions of the Supreme Court of the United States.....9

Sixth Question Presented:

VI. Where Petitioner and his co-defendant were tried together both claiming self defense and /or defense of another pursuant to the "Castle Doctrine," there was unequal protection of Petitioner whose co-defendant coming to his rescue was found not guilty and the Ohio Supreme Court should not have declined jurisdiction to hear this matter.....13

CONCLUSION 15

APPENDIX

Appendix A: Transcript excerpt, comment, and affidavit.....1

Appendix B: Opinion and Entry of the Ohio Tenth District Court of Appeals on Application for

Reopening, Denial of rehearing, State v. Clellan (February 8, 2011), Franklin App. No. 09 AP – 1043, unpublished.....3

Appendix C: Jury Instructions Excerpts.....11

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

Brady v. Maryland, 373 U.S. 83 (1963) .....3 & 4.

California v. Trombetta, 467 U.S. 479 (1984) ..2

Dunn v. United States, 284 U.S. 390 (1932).....14

Estelle v. McGuire, 502 U.S. 62 (1991).....8

Giglio v. United States, 405 U.S. 150, (1972)....4

Harris v. Rivera, 454 U.S. 339 (1981).....14

Illinois v. Fisher, 540 U.S. 547 (2004) 3

United States v. Dotterweich, 320 U.S. 277, (1943).....14

CONSTITUTIONAL AND STATUTORY PROVISIONS PAGE

U.S. Const. amend. XIV 15

28 U. S.C. Section 1257.....1

O.R.C. Section 2901.05 .....7 & 8

Jurisdiction of this Court is conferred pursuant to 28 U.S.C. Section 1257.

PETITIONER'S REPLY BRIEF

I. **Where an appellate court reviews an Application for Reopening an appeal based upon a claim of ineffective assistance of appellate counsel, that Court may not find failure to preserve and produce Petitioner's requested dash camera-videoed alleged "confession" of Petitioner after arrest and disputed position of attacker's car in roadway as only potentially useful evidence and not materially exculpatory when such decision conflicts with established appellate case law.**

Respondent states the lost/destroyed police cruiser video may have recorded events at the scene after the "crime." (RBr. Pg. 8, P 1). However, Officer Felkner who triggered the camera admitted his questioning of Petitioner and his responses were recorded by the camera. (Transcript p. at 143 &144). The intruder's vehicle position in critical issue at trial, but now admitted by Respondent, was also recorded. The camera would also show Petitioner's request to investigate tracks from his vehicle, attacker's footprints on his property, preservation of the scene, and attackers standing at Litchfield's car smoking cigarettes, talking/laughing when the officers arrived. Petitioner's attorney inquired if the video could have contained exonerating evidence. The reply was, "It could have." This question and

response were either deliberately or inadvertently omitted from trial transcription. (see Appendix A - Transcript excerpt/comment/affidavit). Even the deputy's testimony regarding Petitioner's supposed statement on camera does not align with the deputy's professed written "report" of what Petitioner purportedly said. Felkner testified Petitioner told him "he had gotten into an argument with Litchfield" (Transcript p. at 140, lines 16 & 17), and "admitted there were no threats made by Litchfield (Transcript p. at 142, lines 2 & 3)." None of that appears in the "report." Not providing the requested video evidence permitted the deputy even greater liberties in testimony regarding what Petitioner stated in the cruiser and even the appellate court found the officer's representations of Petitioner's "admissions" to be extremely damaging. Such evidence is materially exculpatory, because it possessed both "exculpatory value apparent before the evidence was destroyed, (why trigger the camera to record Petitioner's "confession," (Transcript p. at 143 & 144) then not preserve the tape?) and was "of such a nature that defendant would be unable to obtain comparable evidence by other reasonably available means." California v. Trombetta, 467 U.S. 479, 489 (1984). Petitioner's statements on camera would necessarily carry more weight and credibility being made on the scene and proximate in time to the event, rather than Petitioner's trial testimony nine months later - juxtaposed with an officer's contradictory statements regarding the purported taped "confession." It was not necessary for Petitioner to show bad faith in denying access to the camera evidence, as it was a violation of due process

to withhold such evidence for whatever reason. Illinois v. Fisher, 540 U.S. 544, 547 (2004), citing Brady v. Maryland, 373 U.S. 83 (1963). Any evidence procured by the State should be available to defense whether or not the State intends to use it. Who can know what impact such evidence would have had? This "confession" was not some irrelevant tangential utterance about some unrelated point or occurrence. The deputy's testimony should have been disallowed for failure to provide discovery. He only testified regarding what was supposedly said by Petitioner. There was nothing he witnessed, not being there at the time. What Respondent has asserted regarding video evidence (that it only "recorded events after the "crime" had been committed) could also be said regarding the deputy's testimony, yet the appellate court and Respondent repeatedly asserted the deputy's trial statements were extremely damaging. The deputy testified Petitioner "admitted there were no threats made by Litchfield." (Transcript p. at 142, lines 2 & 3). Petitioner denied making such a statement and the deputy's "report" did not mention it. Miranda warnings do not include an admonition "anything I say you said will be used against you in a court of law." The Petitioner's recorded statement should stand alone to relay the actual statements upon arrest, not the deputy's interpretation nine months later. Petitioner asserts the deputy's omissions of Petitioner's statements regarding Litchfield's threatening actions were more important. Only the video would have delivered crucial parts of the interview to the jury. The deputy's testimony regarding Petitioner's thoughts about Litchfield's

abilities or inabilities is irrelevant under the Castle Doctrine, and calls for infinite speculation.

II. **Where an appellate court denies an Application for Reopening an appeal as stated above, that Court may not find failure to produce in discovery a deputy's statement presented the second day of trial and entered into evidence by the trial judge without objection from Petitioner's counsel not prejudicial to him or to the outcome of his case, without examination of that officer's statement/exhibit and relying only on the transcribed description of such evidence.**

Certain types of evidence must be disclosed by the prosecution in order to safeguard a defendant's due process rights. Brady v. Maryland, 373 U.S. 83, 87 (1963). Evidence possibly used to impeach government witnesses is a critical form of such information a prosecutor must divulge. Giglio v. United States, 405 U.S. 150, 154-55 (1972). The prosecutor failed to provide defense the "report" he held. (Transcript Pg. 78, line 2). The prosecutor brought to attention its existence late on the second day of trial, and not after trial only because he wished to refer to it that day to confuse the jury regarding what Petitioner had related to the deputy who created the "report." Contrary to Respondent's and appellate court's incomprehensible assertion the "nature of the statement and its content was unknown" to them, the transcript is replete with supporting evidence as to what this previously undisclosed "statement of Clellan" or "report" was.

What other "statements" of Petitioner would the prosecution be holding? The prosecutor said it was a "report," and there was no other report of Petitioner's purported statements. The entire line of prosecution's questioning of the deputy relates to that "report." (Transcript Pg. 135 - 142). Counsel, throughout cross-examination, asks him if the statements attributed to Petitioner on the stand are in his "report." (Transcript p. at 142 – 150). He is asked, "Your report says - - is basically ten words or less on what you talked to Mr. Clellan about, am I right? Do you see your report?" He states he does not "have it (report) in front of (him)." (Transcript p. at 145, lines 17 - 20). The deputy is questioned, "When did you write this report?" The officer replies, "The day of the incident." (Transcript p. at 146, lines 21 – 24). Regarding the report, the deputy states he "had to have the report written out before taking [Clellan] to jail. The jail will not accept inmates without the reports." (Transcript p. at 147, lines 3 – 12). Felkner says he believes he "wrote [report] right there in the vehicle." When questioned whether Clellan was shown the "report" or asked to verify it as an accurate accounting of what he said, the officer stated, "No." When asked whether Clellan was asked to initial the "report," the deputy answered, "No." (Transcript p. at 147, lines 15 –23). At the end of deputy's testimony, the Court asks Petitioner's counsel, "Before we proceed, Counsel, did we mark the sheriff's report? I don't know if you intended on moving it for admission, but just for purposes of the record." Petitioner's counsel replies, "No. Should we, your Honor? We can if you want to." The Court responds, "Please." The "report" is

marked as Defendants' Exhibit F. (Transcript p. at 154, lines 4 – 13). There is absolutely no doubt as to what the purloined "report" was, although it is completely baffling how this evidence came to be defense's exhibit. Petitioner's counselor appeared confused regarding marking the exhibit, so much so the Court essentially demanded and moved for the report to be marked as defense exhibit F. Days later, the prosecutor moved to admit exhibit F, the sheriff's "report." During admission of marked exhibits, all items were identified by the Court except Defense Exhibit F, remaining unidentified to defense counsel and was passed through as evidence without his comment or acknowledgement. Petitioner's counselor appeared oblivious to what transpired regarding this extremely critical and highly suspect "report." (Transcript p. at 277 – 280).

The failure of prosecution to timely provide the "report" to defense was very prejudicial to Petitioner on many levels, including his ability to make an informed plea or prepare. The provenience of this document could not be ascertained due to prosecution's ambush delivery. How could Petitioner verify this "report" was the one logged in the prison intake system the night of his arrest? No opportunity was given to investigate source or chain of evidence regarding this "report." The document could easily have been altered or fabricated as the prosecution refused to divulge its existence at the outset when chances for such would be far less. The authenticity of the "report" falls into greater question when one asks, "Why prosecution did not enter this into evidence as state's exhibit and

why the Court insisted defense counsel mark it as Defense Exhibit F?" Did the "report" even exist prior to the second day of trial? Petitioner was greatly harmed by defense counsel admitting this "report" - it contradicted Petitioner's statements. No time was allowed counsel to confer with his client regarding the document, its significance or probative value. As far as counsel's non-objection to the document being trial strategy, this is unreasonable given counsel gave no real appearance of even understanding what it contained or its ultimate significance. Defense was out-gunned, allowing himself to be tricked and bullied into marking and entering it into evidence as a defense exhibit!

III. **Where a "test case" for the "Castle Doctrine" is presented to a jury along with an improper Proposed Jury Instruction regarding Ohio Revised Code Section 2901.05 (see Appendix H), that was further improperly modified by the trial court, the reviewing court may not find such confusing jury instructions did not deprive Petitioner of a fair trial and due process rights.**

Respondent acquiesces to a key point in argument regarding the content of jury instructions at trial: "While the burden of proof is always on the defendant to prove self-defense..." (R.App. B, Jury Instruction Regarding The Castle Doctrine). The definition of <u>always</u> is: "on every occasion; at every time; ceaselessly; continuously; forever" (American Heritage Dictionary of the English Language, (1980) Pg. 40). This prefatory introduction begs the question: "If the burden of proof is <u>always</u> on the

defendant, how can a presumption of self-defense as mandated in the statute exist?" This instruction sets forth a premise confounding logic and any attentive jury encountering it. Under the Castle Doctrine the jury instruction's initial function is to present and underline the presumption of self-defense in the jury's mind, not merely semantically practicable in some alternate universe, but here only as a mutually exclusive scenario of impossibility. By the erroneous insertion of this single phrase, Petitioner's ability to avail himself of self-defense under the Castle Doctrine was disintegrated. There is at the least a reasonable probability the jury applied the instruction in a way violating the Constitution, Estelle v. McGuire, 502 U.S. 62, 72 (1991), rising to the level of a constitutional violation in that it "so infected the entire trial that the resulting conviction violates due process," Id. at 72, and Petitioner was denied the inalienable constitutional right of self-defense. The jury instructions were so confusing they deprived Petitioner of both the presumption of the Castle Doctrine and the affirmative defense of self-defense, effectively eradicating any rights under the law. At no time was Petitioner said to be the aggressor and all agreed he used defensive force. (App. Decision of State v. Clellan (August 17, 2010), 10th Dist. No. 09 AP-1043, P. 20). Litchfield admitted he "went up to" Clellan, stating, "If you're gonna run your mouth . . ." (Transcript p. at 96, lines 2 & 3).

The jury's consideration of Clellan's defense was tainted by court's incomplete and erroneous jury instruction, confusing the 2901.05 inquiry. The

proper result was for the conviction to be vacated and a new trial held.

IV. **Where an attacker had admitted to a 911 dispatcher that he went up to Petitioner who was lawfully in his own vehicle and began threatening Petitioner, the Appellate Court, both on appeal and on Application for Reopening, may not rely on its own interpretation of what "in the process" entails, adding onerous burdens on the defense not intended by the "Castle Doctrine."**

Respondent states no important question of federal law is presented by Petitioner and federal courts may not review state-court interpretations of state law. Respondent contends that federal court is limited to deciding whether a conviction violated the United States Constitution, laws, or treaties. However, where self-defense is denied by a state court's interpretations of law, as in this case, the Supreme Court of the United States has the utmost duty to intervene in maintaining the constitutional rights of that state's citizens.

V. **The Supreme Court of Ohio should not have declined jurisdiction to hear a "test case" under Ohio's new "Castle Doctrine" which as interpreted by the Trial and Appellate Courts denies Petitioner the constitutional right of self-defense.**

Respondent asserts Ohio laws did not deny Petitioner's rights and he disregards Ohio's self-defense statutes. (RBr. Pg. 22). Petitioner's argument is not self-defense statutes do not exist in the State of Ohio, but that trial, appellate and supreme courts of Ohio have denied Petitioner the constitutional right of self-defense through their apparent unwillingness to properly instruct a jury on self-defense under Ohio's statutes or uphold Petitioner's rights under those laws upon review. Respondent maintains "the jury was instructed on self-defense as a presumption and as an affirmative defense." However, the instructions removed any presumption favorable to defense, placed new and onerous burdens upon them and presented an amorphous construct that was a legal morass. Respondent further argues, "the jury did not find Petitioner's actions constituted self-defense." (RBr. Pg. 22). It is no small surprise Petitioner was found guilty given the Alice-in-Wonderland-writing style adopted by those who cobbled together their instructions formulating a maze ending at "guilty," with no alternative avenues. The following paragraph appeared in the jury instructions more than a page prior to any discussion of self-defense:

> "The defendants are each charged with a count of aggravated menacing. Before you can find defendant guilty, you must find beyond a reasonable doubt that on or about the 4th day of February, 2009, and in Franklin County, Ohio, the defendant knowingly caused another; to-wit, Robert Litchfield, to believe that

> John Clellan would cause serious physical harm to said other; to-wit, John Clellan pointed a handgun at Mr. Litchfield and stated, "I will kill your ass." (Transcript p. at 310, lines 14 – 22).

Since Petitioner never denied pointing a gun and telling Litchfield he would be shot if continuing his actions, the jury at this juncture, perforce must deem Petitioner "guilty." Any discussion of self-defense under the Castle Doctrine was tainted with the incorrect phrase, "While the burden of proof is always on the defendant to prove self-defense . . ." (Transcript p. at 312, lines 3 & 4). Insertion of this preface "always," precludes shifting the burden of proof to the prosecution as is required by law, even in light of the fact Litchfield testified he exited his own vehicle <u>angry</u> (Transcript p. at 100, lines 8 – 14 and p. at 105, lines 18 – 24), "<u>had (his) arms up</u>, [and] said, "What the f _ _ _ is your problem?" (Transcript p. at 40, line 4). His companion testified she did not know why Litchfield even got out of his car at that time and did not leave his vehicle for four or more minutes after her first confrontation with Petitioner and no threats were made prior to Litchfield entering the scene. Litchfield, in fact, testified Petitioner was afraid of him. (Transcript p. at 103, lines 20 –23). Even Litchfield's admission against interest/excited utterance to the 911 dispatcher, "I went <u>up to him</u> and said, '<u>If you're gonna run your mouth</u> . . .' you know, whatever[,]" (Transcript p. at 51, lines 5 & 6 and p. at 96, lines 2 & 3), that plainly proved him the aggressor and left no doubt he approached Clellan

and made threats to him as Petitioner occupied his own vehicle, (Transcript p. at 52, line 1), was insufficient to overcome the damage done to defense by piece- meal, conflicting interpretations of the "Castle Doctrine" in the jury instructions.

Further, Ohio's old self-defense law was butchered into bloody stumps spread in and around this castrated new law. Appearing suddenly in the instructions without bridge or explanation regarding what the jury was to do with it, were the words:

> "Self-defense. Defendant claims to have acted in self-defense. To establish that he or she was justified in acting in using **force not likely to cause death or great bodily harm**, the defendant must *prove by the greater weight of the* evidence that he or she was not at fault in creating the situation giving rise to the events that led to the charges of aggravated menacing . . ." (Transcript p. at 313, lines17 – 23, **emphasis added**).

The jury had to conclude Petitioner used force greater than that **not** likely to cause death or great bodily harm and had no alternative but to find him guilty. Nowhere in the instructions did there appear any provision regarding the fact Petitioner had no duty to retreat from his attacker. Although the Castle Doctrine does not present a duty to retreat, an appellate judge even stated Petitioner could have "just driven away." (State v. Clellan, August 18, 2010, 10th Dist. No. 09 AP-1043, 2010-Ohio-3841). No

weight was given the fact Petitioner had no duty to retreat nor to circumstances in which he found himself in a truck in deep snow stuck on his own property under attack by a stranger. Hide-bound subscribers to the duty to retreat rule fail to grasp the reason it was abolished in Ohio self-defense law or the need to allow the use of any force let alone deadly force. Monday morning quarterbacks can say, " Just run like hell!" The Castle Doctrine and Ohio's old self-defense law nullify each other when mixed. The misstated Castle Doctrine is ineffective, and is no aid to a jury in determining what to do once the presumption has obviously been established if there is no attempt to make the law understandable and guide their way. The people of Ohio have spoken in passing the Castle Doctrine. Ohioans want strong self-defense laws. The trial judge and the prosecution in this matter thwart the will of the people. The jury did not "lose its way," but was forced off the path by a prosecutorial lynch mob. So prejudiced was the Petitioner at trial this case should be remanded for retrial where the jury's deliberations will not be tainted by jury instructions such as those previously purporting to be the law in Ohio. Petitioner respectfully requests the Supreme Court of the United States to intervene on his behalf and asserts that it is within the jurisdiction of the United States Supreme Court to uphold the constitutional and inalienable right of self-defense.

VI. **Where Petitioner and his co-defendant were tried together, both claiming self-defense/or defense of another based on the new "Castle Doctrine," there was unequal protection of**

Petitioner whose co-defendant (who came to his rescue) was found not guilty by the same jury and the Ohio Supreme Court should not have declined jurisdiction to hear this matter.

Respondent asserts "inconsistent verdicts are not subject to reversal merely because they are inconsistent." Dunn v. United States, 284 U.S. 390, 393 (1932); United States v. Dotterweich, 320 U.S. 277, 279 (1943); Harris v. Rivera, 454 U.S. 345, 348. Respondent states, "verdicts that treat co-defendants in a joint trial inconsistently are not a sufficient reason for setting the verdict aside." Harris v. Rivera, 454 U.S. at 345, citing Dotterweich, 320 U.S. at 279. Citing Harris v. Rivera, 454 U.S. at 348, Respondent says "[e]ven assuming a co-defendant's acquittal is logically inconsistent with a defendant's conviction, a defendant, who is found guilty beyond a reasonable doubt after a fair trial, has no constitutional ground to complain that his co-defendant was acquitted." Petitioner contends in a case such as his wherein the co-defendant claimed the same defense and the findings are **legally** dependent on each other the acquittal of his co-defendant is **legally** inconsistent, not just logically so. Self-defense presents a unique set of dynamics that must be adhered to for many reasons. Even under the Castle Doctrine, self-defense must correlate between co-defendants, especially in order for one "coming to the aid" of another to be deemed not guilty. Either the jury was inextricably confused or was purposely misled to find one person guilty and the other not. Other types of cases do not have this integral and cohesive mechanism of interdependency.

It must be said the manifest weight of evidence showed the co-defendant came to Petitioner's rescue, availed herself of the Castle Doctrine's defenses and won. If Petitioner were engaging in an unlawful act when his co-defendant came to his aid, how could his co-defendant be found innocent when the two defenses must operate in tandem? No one in a self-defense case may come to the aid of another who is committing a crime. Why were these defenses set up to correlate under the law if they in fact do not? The outcome of this case is altogether disturbing and unsettling for any logical or legal thinking person. Such arbitrary results prove Petitioner was denied constitutional rights to equal protection under the Fourteenth Amendment of the United States Constitution.

CONCLUSION

Petitioner John R. Clellan implores this Court will please grant his petition for writ of certiorari.

Respectfully submitted,

Joan Kathleen Clellan
Ohio Registration No. 0022126
P. O. Box 492
Galloway, Ohio 43119
(614) 561-8657
Counsel of Record
Counsel for Petitioner Clellan